89-2010

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COUNTY OF ALBEMARLE, VIRGINIA,
Petitioner,

v.

WILLIAM S. SMITH, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GEORGE R. ST. JOHN*
ST. JOHN, BOWLING
& LAWRENCE
416 Park Street
Charlottesville, Virginia 22901
(804) 296-7138

Counsel for Petitioner
County of Albemarle, Virginia

**Counsel of Record for Petitioner*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in requiring the County of Albemarle to engage in content-based censorship to exclude a private creche display from a public forum otherwise open on a first come, first served basis to all symbolic speech.

II. Whether the Court of Appeals erred in mandating the exclusion of a privately sponsored creche scene from a public forum when "less restrictive means" were available to accommodate the conflicting Free Speech and Establishment Clause interests.

PARTIES

In addition to the Petitioner and Respondent listed in the caption, the following persons are also Respondents in this action: Paula Kettlewell, Wayne B. Aranson, James J. Baker, Daniel S. Alexander, Douglas W. Kanney, James W. Pence, B. Eliot Singer, Jean M. Quigley and Cynthia K. Davis.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. _____

COUNTY OF ALBEMARLE, VIRGINIA,
Petitioner,

v.

WILLIAM S. SMITH, *et al.*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, the County of Albemarle, Virginia, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is set forth at pages 1a to 19a of the Appendix to this Petition and is reported at 895 F.2d 953 (4th Cir. 1990). The district court opinion and order dated November 9, 1988, granting summary judgment is set forth in the Ap-

pendix at pages 20a to 69a and is reported at 669 F.Supp. 549 (W.D. Va. 1988). The district court opinion and order dated December 29, 1987, denying plaintiffs' motion for a preliminary injunction is set forth at pages 70a to 80a of the Appendix and is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1990 (Appendix at 1a - 19a). The order of the court of appeals denying the petition for rehearing and the suggestion for rehearing en banc was entered on March 28, 1990 (Appendix at 81a - 83a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

U.S. CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment I

U.S. Constitution, Amendment XIV, Section I

County of Albemarle, Virginia, Policy on "Community Use of County Facilities"

The pertinent text of the foregoing constitutional provisions and the text of the foregoing County policy are set forth in the Appendix at pages 111a to 114a pursuant to Rule 14(f) of the Rules of the Supreme Court.

STATEMENT OF THE CASE

This case presents a direct conflict between First Amendment rights granted by the Free Speech and Free Exercise Clauses, on the one hand, and prohibitions underlying the Establishment Clause, on the

other hand. The extreme lines drawn by the court of appeals in this case, in effect, force government to engage in impermissible content-based censorship of private speech in a public forum. It is respectfully submitted that this Court should grant a writ of certiorari in this case to fashion standards that will enable local governments adequately to accommodate and protect the rights granted by the first three Clauses of the First Amendment.

On December 6, 1987, the Charlottesville-Albemarle Jaycees, a private civic organization, erected a creche on the expansive lawn of the Albemarle County Office Building. The Jaycees' display was not sponsored, promoted or paid for by the County, nor was it owned, stored, or erected by the County or its employees. The land on which it was erected is situated at the corner of Preston Avenue and McIntire Road, a busy intersection in downtown Charlottesville, Virginia. The lawn is a park-like expanse of open space in front of the County office building and comprises approximately 2 acres (87,120 square feet) on a tract of public property containing 14.625 acres (Appendix at 103a - 106a). The creche, which occupied an area of approximately 500 square feet (Appendix at 92a) at the far Southwestern corner of the lawn, consisted of a wooden stable, together with three, seven foot tall "Wise Men" located outside the stable, two smaller angels attached to the stable, and the figures of Mary, Joseph and the Christ child inside the stable (Appendix at 92a, 100a - 101a). Upon its erection, a small disclaimer sign was placed in front of the scene which read: "Sponsored by Charlottesville Jaycees" (Appendix at 94a). A few days later, the initial sign was replaced with a larger sign, approximately five

feet by three feet, which read: "Creche Sponsored and Maintained By Charlottesville/Albemarle Jaycees, Not Albemarle County" (Appendix at 5a; 100a). Although the County had only used the office building (formerly a high school) for a period of 6 years, the lawn had been used for a variety of First Amendment activities, including symbolic speech.[1]

Prior to erecting the display, the Jaycees completed an "Application for Reservation of Albemarle County Parks and Recreation Buildings and Grounds" requesting use of the lawn from December 6, 1987 through January 10, 1988 (Appendix at 87a - 88a). The Jaycees also requested use of a nearby electrical outlet on the condition that they pay all utility charges in connection with the display. The County Executive of Albermarle County submitted the Jaycees' Application for consideration by the Albemarle County Board of Supervisors because of a previous controversy over the creche display in the neighboring City of Charlottesville (Appendix at 109a - 110a). The Board of Supervisors approved the Jaycees' Application at a regularly scheduled meeting on December 2, 1987, in accordance with Albemarle County's policy on "Community Use of County Facilities," adopted

---

[1] Public access to the lawn was permitted by the overall policy on "Community Use of County Facilities" (Appendix at 111a - 114a). The lawn was used as a matter of *practice* by numerous groups for classic free speech and assembly activities, political, religious and symbolic, for periods ranging from "several hours to several weeks", including: First Virginia Night (a New Year's eve celebration), the Dogwood Festival (crowning of their queen), the State Volunteer Fireman's Picnic, several weddings and parades, the sale of drinks by nonprofit groups, performances by municipal bands, two Easter sunrise services, display of the United Way appeal placard, and a civil rights demonstration.

in 1982. The County's facilities use policy is found in the Appendix at pages 111a - 114a. The *only* action taken by the County was to approve the facilities use application subject to reimbursement for electrical charges and placement by the Jaycees of a disclaimer sign to eliminate any misunderstanding about County involvement.

On December 14, 1987, the Rev. William S. Smith and 9 other individual plaintiffs (collectively referred to herein as "Smith") filed suit against the County of Albermarle and the members of its Board of Supervisors (pursuant to 28 U.S.C. 1331, 1343(3), 1983, 2201-2202) requesting preliminary and permanent injunctions requiring the County to remove the creche from the lawn, a declaratory judgment declaring the County's actions to be violative of the Establishment Clause and an award of nominal damages. The Jaycees were not made a party to the action. The United States District Court for the Western District of Virginia, Michael, J., held a hearing on December 23, 1987, on Smith's motion to enjoin display of the creche and on December 27, 1987, issued an opinion denying the plaintiff's motion.

Following discovery by the parties, the filing of cross motions for summary judgment, the submission of written memoranda of law, and the argument by counsel, the District Court entered an order and memorandum opinion on November 9, 1988, granting Smith's motion for summary judgment and denying the County's cross motion. The Court issued a declaratory judgment ruling that the creche display violated the Establishment Clause. In an opinion accompanying the order, the District Court concluded that although the lawn was in the nature of a tra-

ditional public forum (Appendix at 48a - 49a; see also Appendix at 76a), the County must exclude the private speech in question because of what the Court deemed to be the "unseverable visual association between the trappings of County government and the religious symbols" leading to "the unmistakable message of [government] endorsement", thereby violating the Establishment Clause (Appendix at 45a).

On December 2, 1988, the County of Albemarle noted its appeal. Following briefing and argument, a three judge panel of the United States Court of Appeals for the Fourth Circuit issued an opinion on February 8, 1990, by Murnaghan, Circuit Judge (Appendix at 1a), affirming the District Court, with Chief Judge Blatt of the United States District Court for the District of South Carolina, sitting by designation, in dissent (Appendix at 15a). On March 28, 1990, the panel voted 2-1 to deny rehearing of the case and, upon suggestion for rehearing en banc, the full Fourth Circuit Court of Appeals voted 5-3, with two judges recusing themselves, to deny rehearing in banc (Appendix at 81a).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Misplaced Reliance upon this Court's decision in *Allegheny County*.

The court of appeals would require the County to exclude the Jaycees' creche from the lawn of its office building because of its religious nature and the "patent aura of government endorsement" which it saw in the display. It is respectfully submitted that this judicially-mandated, content-based exclusion "unnecessarily trammel[s] the right of free speech"[2] in a

---

[2] The quoted words are from the dissent of Chief Judge Blatt, Appendix at 19a.

public forum and strikes an inequitable balance in reconciling precious, but nonetheless in this case, competing civil liberties protected by the First Amendment's Free Speech, Free Exercise and Establishment Clauses.

In its largely conclusory opinion, the court of appeals misplaced emphasis on this Court's decision in *County of Allegheny* v. *ACLU*, ___ U.S. ___, 109 S.Ct. 3086 (1989) ("*Allegheny*"). Instead of conducting a careful analysis of the facts of the case, the court of appeals majority made but a few broad brush comparisons between this case and the *Allegheny* case and summarily proceeded to condemn the display primarily because it was deemed to be a "prominent" religious display in a government setting (Appendix at 10a).[3] The court of appeals' failure to engage in a careful analysis of the facts inexorably led it to ignore the obvious factual distinctions between *Allegheny* and this case. *Allegheny* involved a creche display in a *non-public* forum not open for Free Speech. The very

---

[3] The factors the court of appeals considered dispositive were: (1) the creche was not associated with any secular symbols; (2) it was situated on "a prominent part, not only of the town, but of the county office structure itself"; and (3) it was situated in the line of sight of the prominent sign identifying the building as a government structure (Appendix at 10a). The impact of the explicit disclaimer sign in front of the display was deemed to be mitigated by its size, and the Court went on to caution: "it remains to be seen whether *any* disclaimer can eliminate the patent aura of government endorsement of religion" (Appendix at 11a). The compelling Free Speech concerns of the County in providing equal access for all citizens to public facilities were minimized and deemed overridden by a judicially declared "compelling state interest" in preventing an Establishment of Religion.

presence of a creche in a *non-public* forum arguably raises a presumption of favoritism in the mind of a reasonable observer. Moreover, in the *Allegheny* case, the County was *actively* involved in erecting, storing, funding, promoting, enhancing and sponsoring the creche display. And the purported disclaimer sign, "Sponsored by the Holy Name Society", was no disclaimer at all. It merely amplified County endorsement and promotion of the creche display.[4]

In contrast, there was *no* affirmative governmental participation of any kind in the present case. The County simply permitted the use of a public forum on a first come, first served basis pursuant to a preexisting, general, non-discriminatory facilities use policy (Appendix at 107a - 110a; 111a - 114a). There was a sufficiently large sign that specifically disclaimed County sponsorship of the display. And, unlike *Allegheny*, the location of the private display was in an open public forum that had been used on numerous occasions in the past for social, commercial, religious, artistic and political expression and other privately sponsored events.

It is this latter public forum distinction, especially, that the court of appeals failed to accord sufficient analysis and emphasis. In *Allegheny*, the plurality *recognized* explicitly that a privately sponsored creche display in a public forum might present a different analysis or outcome:

> The Grand Staircase does not appear to be the kind of location in which all were free to place

---

[4] *Allegheny*, 109 S.Ct at 3105. The relevant facts surrounding the menorah in the *Allegheny* case are discussed separately at pp. 12-13 *infra*.

> their displays for weeks at a time, so that the presence of the creche in that location for over six weeks would then not serve to associate the government with the creche. . . . In this respect, the creche here does not raise the kind of "public forum" issues, cf. *Widmar* v. *Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L. Ed. 440 (1981), presented by the creche in *McCreary* v. *Stone*, 739 F.2d 716 (CA2 1984), aff'd by an equally divided Court, *sub. nom. Board of Trustees of Scarsdale* v. *McCreary*, 471 U.S. 83, 105 S. Ct. 1859, 85 L. Ed. 2d 63 (1985) (private creche in public park).

Allegheny, 109 S. Ct. at 3104, n. 50. *See also id.* at n. 38. The case at bar presents the public forum issue in its pristine form. The writ of certiorari should therefore be granted to resolve this important issue, both for the benefit of the parties, as well as for the benefit of the countless municipalities that face this vexing issue each year.

II. The Fourth Circuit decision conflicts directly with decisions in the D. C., Second, Third and Sixth Circuits underscoring a substantial conflict in the circuits that this Court should resolve.

As Chief Judge Blatt pointed out in dissent, the court of appeals majority seriously undervalued the Free Speech and Free Exercise Clauses. In doing so, it overlooked several conflicting decisions from other circuits. These decisions, taken as a whole, recognize long-established Free Speech/public forum principles that conflict with the reasoning of the court of appeals in the case at bar. The conflict among the circuits on the question of the display of religious symbols in public forums is substantially evident in decisions of

the District of Columbia, Second, Third, Fourth and Sixth Federal Appellate Circuits.[5]

District of Columbia Circuit. In *Allen* v. *Morton*, 495 F.2d 65 (D. C. Cir. 1973), the District of Columbia Circuit indicated that a private creche display free of government funding or sponsorship would be permitted in connection with the Pageant of Peace on the Ellipse of the National Mall. The erection of the display in what was essentially a public forum was subject to placement of properly exhibited disclaimer signs. Although the three-judge panel was split, it was the prevailing opinion that disclaimer signs would remedy any Establishment Clause problem. In a subsequent decision, the D. C. Circuit upheld against an Establishment Clause challenge a Mass to be conducted by Pope John Paul II on the grounds of the National Mall, Washington Monument, Ellipse, Lincoln Memorial green and United States Capitol grounds. *O'Hair* v. *Andrus*, 613 F.2d 931 (D. C. Cir. 1979). This latter case, and its significance for the case at bar, is discussed below in more detail at pp. 18-20 *infra*.

Second Circuit. In *McCreary* v. *Stone*, 739 F.2d 716 (2nd Cir. 1984), *aff'd by equally divided Court, sub. nom. Board of Trustees of Scarsdale* v. *McCreary*, 471 U.S. 83 (1985), a private group sought to gain access to a small traffic circle in the center of the retail

---

[5] The Seventh Circuit has decided two cases on facts substantially identical to those found in the *Allegheny* case and in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), respectively. *See American Jewish Congress* v. *City of Chicago*, 827 F2d 120 (7th Cir. 1987) and *Mather* v. *Village of Mundelein*, 864 F.2d 1291, *rehearing denied*, 869 F. 2d 356 (7th Cir. 1989). Neither case presented the public forum questions presented in this case.

business district of the Village of Scarsdale, New York, to display a creche. In the face of a challenge to the Village's refusal to permit the display, the Second Circuit ruled that the Establishment Clause did *not* bar a private group from the exercise of its Free Speech rights in a public forum. The Court also concluded that an appropriate disclaimer would help to alleviate any Establishment Clause concerns. The *McCreary* case was accorded *plenary* consideration by this Court and *affirmed*, following oral argument, by an equally divided vote. 471 U.S. 83 (1985). Accordingly the *McCreary* decision is deserving of far greater precedential weight than the court of appeals was willing to recognize.[6]

In a more recent decision, *Kaplan* v. *City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), *pet. for cert.* denied, No. 89-1625, June 11, 1990, the Second Circuit ruled that a privately sponsored menorah must be excluded from a park adjacent to the Burlington City Hall. The *McCreary* case was distinguished on

---

[6] The Fourth Circuit Court of Appeals suggested that the "aura" of endorsement was not present in the *McCreary* creche case because of its display in a "park." In fact, the "park" in *McCreary* was a small (3,257 square foot) traffic circle in the center of the retail business district of Scarsdale, New York. It was common knowledge that this traffic circle, so prominent in the Village center, was Village property. The six foot, privately sponsored Scarsdale creche contained a small disclaimer sign (10-3/4 inches by 14-1/2 inches). It was precisely the smallness of the sign that prompted the Second Circuit to remand the case for a determination as to the proper size, visibility and wording of the disclaimer sign. In the present case, the Jaycees seven foot creche on the much larger lawn acreage had a disclaimer sign of approximately five feet by three feet (Appendix at 100a; 103a - 106a).

grounds that the menorah was not displayed in just any park, but in *City Hall* Park, adjacent to "the official symbol of Burlington city government." *Id.* at 1029. Although the "seat of government" distinction between *McCreary* and *Kaplan* has superficial appeal, the conflicts in the factual underpinnings of both decisions, as well as the significant First Amendment Free Speech interests involved, suggests the need for a more definitive resolution of the public forum issue raised by both cases.

Third Circuit. Renewed litigation in the wake of the *Allegheny* case in the Third Circuit, *Chabad* v. *City of Pittsburgh*, 89-2432 (W. D. Pa., Dec. 20, 1989)); No. 89-3793 (3rd Cir., Dec. 26, 1989); No. A-476 ___ U.S. ___ , 110 S. Ct. 708 (1989), centers on the public forum question. After the *Allegheny* decision, the City of Pittsburgh refused to permit Chabad (an orthodox Jewish group) to erect its previously displayed menorah outside City Hall. Chabad sought an injunction requiring that the City permit it to erect the menorah. One basis for the injunction was that the "site of the display was a 'public forum' to which the City could not constitutionally deny access for peaceful and constitutional forms of religious expression such as the menorah."[7] In the words of the Motion filed by Chabad with Justice Brennan acting as Circuit Justice:

> [Judge Barron P. McCune] issued an oral opinion in which he ruled only on the third of the plaintiff's three claims—*i.e.*, the "public forum"

---

[7] Motion to Vacate "Temporary Stay" of Preliminary Injunction filed December 22, 1989, in *Chabad* v. *City of Pittsburgh*, No. A-476, United States Supreme Court, at 2.

> argument. He said that "the plaintiffs established that the last step of the step[s] of the City Building is a public forum." He noted that "it's [sic] been used as a public forum for this very Menorah since 1981" and that "the testimony showed in this case, it's [sic] been used for public demonstrations."

Id. at 4. After the injunction was issued mandating the City to permit the erection and display of the menorah on the steps of City Hall, Circuit Judge Weis stayed the injunction. A three-judge panel of the Third Circuit denied reconsideration of Judge Weis' stay. Upon application, Justice Brennan issued an order on December 22, 1989, vacating Judge Weis' stay and reinstating the District Court's injunction pending disposition of the case. A subsequent motion by the City of Pittsburgh requesting vacation of Justice Brennan's order was denied by the full U.S. Supreme Court on December 28, 1989, with three Justices dissenting. *Chabad* v. *City of Pittsburgh*, ___ U.S. ___, 110 S. Ct. 708 (1989).

The significance of the proceedings in the Third Circuit is that the public forum question remains a highly contested and important constitutional question, as this Court expressly reserved in the *Allegheny* case. Admittedly, the menorah in the *Allegheny* context was deemed not to be an entirely religious symbol. However, the *Kaplan* case demonstrates that in another context it may be viewed as a religious symbol. And the *Chabad* proceeding demonstrates the existence of grave questions as to the power of municipalities to engage in content-based discrimination in a public forum.

Sixth Circuit. In *ACLU of Kentucky* v. *Wilkinson*, 895 F.2d 1098 (6th Cir. 1990), the Sixth Circuit upheld the funding, erection and prominent display of a "biblical-age" stable by the Commonwealth of Kentucky on the grounds of its State Capitol. The stable, which was owned by the Commonwealth, was a forum used for live nativity scene displays and the singing of Christmas carols by choral groups. After a constitutional challenge in the *Wilkinson* case, the Commonwealth acceded to an order issued by the District Court permitting the stable to remain provided the following corrective actions were taken: (1) all expenditures of public funds past and present for the stable must be defrayed from private funds, (2) a prominent disclaimer sign must be placed at the site, and (3) the stable and the surrounding area must be considered to be a public forum, open to use by all who apply. Under these circumstances and based on the context of the display among seasonal decorations, the Sixth Circuit found that the stable and the uses to which it was to be put would not violate the Establishment Clause.[8]

Although the factual setting of the *Wilkinson* case is more akin to that found in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984) (in that the Commonwealth of Kentucky actually owned and sponsored the display), it is difficult to reconcile the decision with the court of appeals' opinion in this case, both in its analysis of

---

[8] In the 1986 case, *ACLU* v. *City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986), the Sixth Circuit held that a City-owned, City-funded, City-erected creche on the lawn of the City Hall in Birmingham, Michigan, violated the Establishment Clause. This case did not present the public forum issue found in the case at bar.

the public forum issues and its reliance on a disclaimer to mitigate any Establishment Clause concerns.

III. There is a need for a well-defined standard of analysis in the "head-to-head" clash of Free Speech, Free Exercise and Establishment Clause values.

This case presents an obvious conflict among the Free Speech, Free Exercise and Establishment Clauses of the First Amendment. It arises, however, in a somewhat different legal posture than the three creche cases—*Lynch*, *Allegheny*, and *McCreary*—this Court has previously considered. In *Lynch*, there was no public forum issue; in *Allegheny*, the public forum issue was reserved; and in *McCreary*, the Village had *denied* the private sponsors of the display access to a public forum. Here, the County has *granted* access pursuant to an express open forum policy. In this legal posture, one group of private citizens is complaining that the grant of access to a second group of private citizens to erect a creche display violates their Establishment Clause rights. They seek to require the County to censor this second group of citizens based on the content of their speech. And parties *amici curiae*[9] have joined in th litigation below to assert their own individual Free Speech and Free Exercise rights and to protest threatened discrimination based on the content of their speech. This case, unlike most others this Court has heard or reviewed, presents in clear terms what Judge Blatt called a "head-to-head clash of these two competing First Amendment rights." 895 F.2d at 961 (Blatt, J., dissenting).

---

[9] The names of the parties *amici curiae*, Northside Baptist Chruch et al. are listed in the style of the case in the court of appeals. See Appendix at 1a.

The court of appeals analysis of these competing claims is curiously muddled. Recognizing that the lawn is at least a designated, if not a traditional, public forum, it employs the familiar test that "government can enforce a content-based speech regulation in a public forum only when the regulation serves a compelling state interest and is narrowly drawn to achieve that end." 895 F.2d at 959. Borrowing from language of this Court in the case of *Widmar* v. *Vincent*, 454 U.S. 263, 271 (1981), it proceeds to discern in this case a "compelling state interest" for government not to violate the Establishment Clause. But in the *Widmar* case, the University of Missouri at Kansas City had actually adopted a specific policy closing University facilities to religious groups to advance what it believed to be its compelling Establishment Clause obligations. No such policy is being advanced by government in this case.[10] The analytical framework of the court of appeals is thus flawed, at least semantically, in its invocation of a "compelling state interest" against the Establishment of Religion. The Constitution (i.e. the Establishment Clause) may, in fact, compel courts to require a government to take certain action, but this compulsion may not necessarily equate with a government's advancement of a "compelling state interest" not to violate the Establishment Clause.[11] In the case at bar, there is no

---

[10] "Compelling state interests" arise in the context of governmental policy objectives underlying legislative and executive actions. They have no independent life of their own in constitutional adjudication apart from judicial recognition of their specific advancement in support of legislative and executive branch action.

[11] *Widmar* is a case in point. Although the University's policy

legislative or executive branch action requiring "justification" in terms of a compelling state interest not to violate the Establishment Clause. Rather, instead of necessitating an assessment of the constitutional validity of restrictive government action based on such a compelling state interest, as in *Widmar*, this case presents a more direct conflict of constitutionally asserted values: (1) a claim by the respondents that government has violated their Establishment Clause rights; (2) a claim by the County that it should not be required to engage in impermissible content-based discrimination in the implementation of its policy of granting equal access to a public forum; and (3) argument by parties *amici curiae* that their individual Free Speech and Free Exercise rights are imminently threatened by the content-based exclusion of expressive activity that the respondents request the federal courts to impose.

The court of appeals' analysis of the "compelling state interest" in this case, as well as its application of Free Speech and Establishment Clause standards, is, thus, in one sense, inverted and confused. The conventional constitutional pigeonholes simply do not fit the situation where government is advancing a content-neutral equal access policy, and one group of citizens is objecting on Establishment Clause grounds, and another group is objecting to their threatened exclusion from a public forum. Chief Judge Blatt recognized this analytical difficulty in dissent:

---

seeking to comply with the Establishment Clause was recognized to advance a "compelling state interest," it was also found not to be sufficiently compelling to override the University's concurrent equal access policy grounded in the Free Speech Clause, which forbids content-based exclusion of speakers.

> The analysis employed by the district court, and approved by the majority, uses the "endorsement" test of *Allegheny County* and applies it to the Free Speech "compelling interest" test. While there is a certain logic to these two First Amendment tests, I do not feel the merger of these standards comports with the spirit and intent of the protection of free speech.

Appendix at 16a (Blatt, J., dissenting). Perhaps in greater measure than in previous cases, "the resolution of this issue calls for a delicate balancing of individuals' rights to religious expression with the proscription against the government's establishment of religion." *Kaplan* v. *City of Burlington*, 891 F.2d at 1031 (Meskill, J., dissenting).

The draconian position of the court of appeals prohibiting the display of a private creche in a public forum is grounded in the unsubstantiated fear that citizens will mistakenly conclude that government endorses everything it does not censor.[12] This position not only discredits the intelligence of the reasonable observer, it is also incompatible with important Free Speech principles and the pluralistic nature of our society.

These elements were discussed eloquently by Judge Harold Leventhal in a significant D. C. Circuit case involving a direct conflict between Free Speech and Establishment Clause interests. In *O'Hair* v. *Andrus*,

---

[12] *Westside Community Board of Education* v. *Mergens*, ___ U.S. No. 88-1597, June 4, 1990, Slip Opinion at 20 (O'Connor, J.); *see also* Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. L. Rev. 1, 15 (1986).

613 F.2d 931 (D. C. Cir. 1979), renowned atheist Madalyn Murray O'Hair sought to enjoin the conduct of an outdoor Mass by Pope John Paul II to be situated at the apex of the National government, i.e., at the Washington Monument, the Ellipse, the National Mall, the Lincoln Memorial green and the United States Capitol grounds. Judge Leventhal, writing for the D. C. Circuit, refused to enjoin the Mass, stating:

> A central aspect of our pluralist society is its religious diversity. This pluralism reflects the very purpose of the Establishment Clause. And this pluralism is nurtured by the precept of equal access to a public facility generally open to the public.

Id. at 934-935. In the *O'Hair* case, Mrs. O'Hair specifically raised the spectre of government endorsement of the Catholic faith posed by the performance of the Mass at such a "prominent" governmental location:

> Appellants say that the government permit for this occurrence *on the renowned National Mall* sends an implied message—to the nation and to the world—of government approval (and, therefore, "establishment") of this church service. It implies no more approval for this church than for any other group using the Mall. The message it does send to the world is approval of the principle of freedom of demonstration, for all groups, for all religions, even for those opposing religion.

Id. at 936 (emphasis added). If the backdrop of the most identifiable symbols of American government—the Washington Monument, the United States Capitol and the Lincoln Memorial on the National Mall—does

not convey the message of endorsement of a Mass attended by tens, if not hundreds of thousands of people, it is difficult to argue in the case at bar that the creche in its context does convey a message of endorsement, particularly in the light of the specific disclaimer of endorsement made at the site of the display.

"[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Westside Community Board of Education* v. *Mergens*, *supra*, Slip Opinion at 20 (O'Connor, J.). The equal right to advocate one's views in the public square, whether religious or otherwise, is a fundamental, affirmative freedom. While certainly any credible implication of government endorsement of religious speech should be explicitly disclaimed, forcing government to deny citizens equal access to the public arena and disqualifying them in the equal exercise of their Free Speech and Free Exercise rights, solely on the basis of the content of their intended speech, is severely intrusive on important rights explicitly granted all citizens by the Constitution. Such a disqualification is not unlike a "religious test" for the exercise of basic constitutional privileges, a practice long condemned in our history. *See* U.S. Const., Article VI. For these reasons, the exclusion of speakers from a public forum based on the content of their speech should serve only as a remedy of last resort. As Mr. Justice Brandeis said years ago, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not

enforced silence." *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

The court of appeals would force the County to sever the private religious display from the public square, in effect, declaring the banned speakers to be "outsiders" and "less than full members of the political community," not unlike the complaint of persons offended by the alleged endorsement in question. *Cf. Allegheny*, 109 S.Ct. at 3118. The severance of private symbolic religious speech from public property unquestionably demeans it and, purely and simply, renders it second class speech. Unlike others who may, for example, seek to oppose apartheid with symbolic tent cities,[13] or indeed, to burn the American Flag as a symbol of protest,[14] the County is required by the court of appeals ruling not only to deny access to one group of speakers seeking to compete in the public marketplace of ideas, but, in effect, to impose against that group of citizens a badge of inferiority based solely on the content of their message. The court of appeals in the case at bar was, therefore, imprudently extreme in its requirement that the County ban the private holiday display outright from the public square.

In his dissent in the case at bar, Judge Blatt stated he would recognize the factually based nature of the inquiry and "incorporate the public forum factor into the calculus of the 'Establishment' equation." Appendix at 16a (Blatt, J., dissenting). Consonant with this Court's recognition in *Allegheny* that "the effect of

---

[13] *Students Against Apartheid Coalition* v. *O'Neill*, 660 F. Supp. 333 (W.D. Va. 1987).

[14] *Texas* v. *Johnson*, ___ U.S. ___, 109 S. Ct. 2533 (1989).

a creche display turns on its setting," 109 S. Ct. at 3101, Judge Blatt would consider any endorsement arising from the "governmental trappings" of the forum to be mitigated by the very fact of the creche's display in the public forum "setting". This same approach was advocated by Judge Meskill in the *Kaplan* case: "the fact that the display is in a public forum in which a wide variety of other kinds of speech and expression takes place is a factor negating governmental endorsement of the religious message of the display." *Kaplan* v. *City of Burlington*, 891 F.2d at 1033 (Meskill, J., dissenting).

And if the public forum element is not enough in any given context to remedy the alleged Establishment Clause concern, both Judge Blatt and Judge Meskill suggest a "less-restrictive-means" short of exclusion to negate any perception of endorsement. In their view, a sufficiently visible disclaimer sign would preserve for all citizens the exercise of their First Amendment Free Speech rights and yet protect against any suggestion of government endorsement, those whose rights of conscience might be pricked by the display in a public forum setting.

It is apparent that the novel issues presented by this case do not fit the normal "pigeonholes" of constitutional analysis. This Court should, therefore, grant the writ of certiorari to determine what constitutional standards properly apply in this head-on conflict of constitutional values.

IV. In its exclusion of the privately-sponsored display from a public forum, the court of appeals failed to employ the "least-restrictive-alternative" standard even though less restrictive means were readily available to satisfy Establishment Clause concerns.

A. The Least-Restrictive-Means Standard.

The court of appeals majority concluded that it was necessary to enforce an "outright exclusion" of the private creche from the public forum because the "aura" of endorsement was so pervasive that no "narrowly tailored" means short of exclusion would remedy the problem. The paucity of the court's analysis on this point, however, is exceeded only by its circular and opaque reasoning, to wit: "If a disclaiming sign is not sufficient to alter the message of endorsement, it is paradoxical to conclude that requiring such a disclaimer serves as a more narrowly tailored regulation." Appendix at 14a.

The majority opinion makes no mention of the applicable standards developed in an important series of recent decisions of this Court involving governmental restrictions on Free Speech. *See Boos* v. *Barry*, 485 U.S. 312 (1988).[15] In *Boos*, this Court struck down a provision of the D. C. Code that imposed an overtly content-based penalty on speech that was critical of

---

[15] *Cf. Frisby* v. *Schultz*, ___ U.S. ___, 109 S. Ct. 2495 (1988) (time, place and manner regulation - restrictions must target and eliminate the exact source of the "evil"); *Ward* v. *Rock Against Racism*, ___ U.S. ___, 109 S. Ct. 2746 (1989) (time, place and manner regulation only - *Frisby* standard); and *Board of Trustees, State University of New York* v. *Fox*, ___ U.S. ___, 109 S. Ct. 3028 (1989) (commercial speech - there must be a "fit" between the legislature's ends and the means chosen to accomplish those ends).

foreign governments within 500 feet of embassies. In doing so, it found that a "less restrictive alternative" was readily available. *Id.* at 329. The application of this standard was later discussed by the Court in *Ward* v. *Rock Against Racism*, ___ U.S. ___, 109 S. Ct. 2746, 2758, n. 6 (1989):

> In *Boos*, we concluded that the government regulation at issue was "not narrowly tailored; a less restrictive alternative is readily available." . . . The regulation we invalidated in *Boos* was a content-based ban on displaying signs critical of foreign governments; such content-based restrictions on political speech "must be subjected to the most exacting scrutiny." While time, place or manner regulations must also be "narrowly tailored" in order to survive First Amendment challenge, we have never applied strict scrutiny in this context.

Because the case at bar similarly involves explicit *content* discrimination, any exclusion or restriction of the creche must be subjected to "exacting scrutiny" and yield to the "least restrictive means" standard found in the *Boos* case.

Despite the court of appeals' recognition of the inherent content-based nature of an exclusion of the creche, it nevertheless failed to conduct any analysis whatsoever of less restrictive alternatives. There was no examination of alternate remedies, such as considering the size, visibility or number of the disclaimer signs, or the time period for the display, or the size or placement of the display or any other restrictions. Despite the fact that there had been other continuing symbolic displays on the site,[16] the *only* alternative

---

[16] See note 1, *supra*, and Appendix at 94a.

that the court of appeals majority apparently considered in this instance was the exclusion of the display outright. The clear absence of "narrow tailoring" in the majority opinion suggests the majority was using a less stringent standard of review than is required for the content-based exclusion of speech from a public forum.

B. Means less restrictive than total exclusion of the creche were available in the case at bar to protect both the Establishment Clause and Free Speech/ Free Exercise interests.

In this case, the second disclaimer sign was of sufficient clarity, size and visibility to dispel any suggestion of government endorsement. And even if the sign was not sufficient in some respect, the case should have been remanded to the District Court for proceedings to determine the size, visibility and message of an appropriate disclaimer. The less restrictive alternative of a disclaimer recognizes not only the Establishment Clause concerns in this case, but also the equally compelling Free Speech interests. Such a balance would be far less intrusive on Free Speech rights and would not otherwise offend nonadherents who themselves would have the right to advance their own views in the forum.

As previously mentioned, at least three circuit courts of appeal have recognized the value of the disclaimer sign in dispelling the perception of endorsement. *See Allen* v. *Morton*, *supra* (D.C. Circuit); *McCreary* v. *Stone*, *supra* (Second Circuit); and *ACLU of Kentucky* v. *Wilkinson*, *supra* (Sixth Circuit). A proper disclaimer message "will ensure that no reasonable person will draw an inference that the Village supports any church, faith, religion associated with

the display of a creche during the Christmas season . . . ." *McCreary* v. *Stone*, 739 F.2d at 728.

This Court, too, has previously approved the effectiveness of disclaimer signs in *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), and in the *Allegheny* decision itself, where it was indicated that "[w]hile no sign can disclaim an overwhelming message of endorsement . . . an 'explanatory' plaque may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs." *Allegheny*, 109 S. Ct. at 3114-15. Finally, Justices Marshall and Brennan, concurring in *Westside Community Board of Education* v. *Mergens*, *supra*, Slip Opinion at 9, noted that "if the school sought to continue its general endorsement of those student clubs that did not engage in controversial speech, it could do so if it also *affirmatively disclaimed* any endorsement of the Christian Club."

The court of appeals majority appears to be satisfied with no less than complete expungement of private religious speech from the public square, or at least in front of any overtly governmental setting. This, despite the fact that there was no evidence in the record to suggest that a reasonable observer would conclude, with or without a reasonable disclaimer sign, that the County had endorsed the display. And certainly no reasonable observer who read the text of the disclaimer sign in this case could conclude that this display was endorsed or sponsored by government.[17] The sign was of sufficient clarity,

---

[17] The *Allegheny* endorsement standard is based on the reasonable observer. *Allegheny*, 109 S. Ct. at 3104.

size and visibility to negate "any hint of governmental endorsement that a viewer might 'perceive.' " *Kaplan* v. *City of Burlington*, 891 F.2d at 1034 (Meskill, J., dissenting). And even if it were not, the case should have been remanded for proceedings to determine the proper size, visibility and message of an appropriate disclaimer. This "less restrictive alternative" would have recognized the proper balance between Establishment Clause concerns and Free Speech and Free Exercise interests.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari be granted and that the issues raised therein be decided by this Court.

GEORGE R. ST. JOHN*
ST. JOHN, BOWLING
& LAWRENCE
416 Park Avenue
Charlottesville, Virginia 22901
(804) 296-7138

Counsel for Petitioner
County of Albemarle, Virginia

**Counsel of Record for*
Petitioner